

STATE OF MICHIGAN
COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CLAYTON HILL,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 231695

St. Clair Circuit Court

LC No. 0-1943-FH

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his conviction after jury trial of possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv), and resisting and obstructing a police officer, MCL 750.479. We affirm.

I. Facts

After the St. Clair County Sheriff's Department drug task force (task force) received information from various informants that defendant was involved in drug trafficking, defendant became the focus of a task force investigation. Specifically, the task force received information that on the date of defendant's arrest, he would be in the area of the intersection of 11th and Gillette streets, that he would be carrying controlled substances in the crotch of his underwear, and that defendant would be wearing a "dark colored possibly black knit-style hat, black or a least dark jacket, dark jeans." The task force undertook a surveillance operation in the area in question, beginning their observation of defendant approximately 20-30 minutes before they approached him on the porch of the home located at 1104 Gillette. Defendant was seen leaving a nearby home that had been the subject of prior task force drug raids before he went to the porch of 1104 Gillette.

Defendant was approached by the four members of the task force as he began knocking on the front door of 1104 Gillette Street. As the task force members approached, defendant was holding a brown paper bag, which he dropped when the task force members announced themselves as "police." The bag held a Minute Maid juice bottle containing what appeared to be water and a floating substance, which task force members believed, and was later confirmed, to be crack cocaine. Defendant was informed after he dropped the bag that because of safety concerns, he was going to be handcuffed and patted down in a check for weapons. When one of the officers attempted to handcuff defendant, defendant began pulling away, and a scuffle ensued

to bring defendant under control. During the scuffle, all four of the officers and defendant fell to the ground.

After defendant's arrest he was taken to the county jail, where he was strip searched in accordance with normal procedure following task force arrests. The procedure required defendant to remove one article of clothing at a time, and required a corrections officer to inspect each item as it was removed. When defendant was asked to remove his underwear, he refused and asked for an attorney. The corrections officer forcibly removed defendant's underwear, and a plastic baggie containing several rocks of cocaine fell from the crotch area. The officers also found several other items on defendant's person as a result of the search, including two small plastic baggies, over \$700.00 in cash, a cellular phone, and a pager.

The case proceeded to trial, and after the prosecution presented its case in chief defendant moved to quash the information and to suppress the evidence against him, claiming that his warrantless arrest was illegal. Defendant contended that there was no evidence that there was anyone at the Gillette Street home when defendant went to the front door, and as such, there could be no evidence that defendant intended to deliver a controlled substance and no probable cause to arrest defendant for possession with intent to deliver cocaine. Defendant also argued that the prosecution failed to prove the charge of resisting and obstructing. Defendant asserted that his arrest was not justified based on the informant's tip and that therefore the arrest was unlawful and the prosecution could not meet its burden of proving beyond a reasonable doubt that there had been a lawful arrest.

The prosecution argued that because defendant's motion to quash the information and suppress the evidence was not brought until the close of its case in chief, the motion was procedurally inappropriate. The prosecution also opposed defendant's motion substantively, arguing that defendant's arrest was legal under MCL 764.15(g), which provides in relevant part that if a "peace officer has reasonable cause to believe the person . . . has violated a condition of parole from prison," the officer may arrest without a warrant. The prosecution contended that because the officers involved were aware that defendant was on parole, their observation of the floating substance in the Minute Maid bottle, together with the information they had from the informant, established probable cause that defendant was in possession of cocaine and justified his arrest.

The trial court denied defendant's motion, finding that the evidence presented by the prosecution established probable cause to arrest defendant and that therefore the arrest was lawful. Defendant then requested that the trial court instruct the jury pursuant to CJI2d 13.5, which defines a legal arrest. The prosecution objected to this jury instruction, arguing that because the court had already determined that since probable cause existed the arrest was legal, the instruction should be given only in the event the jury raised the question of the legality of the arrest during its deliberations. The trial court ruled that the requested instruction would not be given to the jury unless the jury expressed a concern about the legality of the arrest. Defendant was permitted, however, to make such closing arguments defendant deemed appropriate under the circumstances.

On appeal, defendant claims that the trial court erred by failing to define for the jury the elements of a legal arrest, pursuant to CJI2d 13.5, and that the trial court also erred by failing to suppress the evidence seized as a result of defendant's arrest because the arrest was illegal.

II. Standard of Review

Claims of instructional error are reviewed de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). Similarly, a ruling on a motion to suppress evidence is reviewed de novo. *People v McKinney*, 251 Mich App 205, 207; 650 NW2d 353 (2002), quoting *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). The trial court's factual findings on a motion to suppress will not be reversed except for clear error. *Id.*

III. Analysis

The trial court did not err by refusing to instruct the jury pursuant to CJI2d 13.5. "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence." *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). Moreover, the jury must be instructed so that it can correctly and intelligently decide the case. *Marion, supra* at 448. "[A]n instruction that is without evidentiary support should not be given." *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Considering the jury instructions as a whole, see *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995), we find that the jury was properly instructed by the trial court because the jury was instructed that in order to convict the defendant of resisting and obstructing, the evidence must show beyond a reasonable doubt that defendant knew the person he was resisting was an officer of the law and that the arrest defendant resisted was lawful.

While the prosecution did have the burden of proving the legality of defendant's arrest, see *City of Detroit v Smith*, 235 Mich App 235, 249; 597 NW2d 247 (1999), defendant did not argue to the jury that his arrest was illegal. Rather, the focus of the defendant's opening and closing statement to the jury was that when defendant struggled with the police he did not know that the people who had approached him were police officers, and that the officers had inappropriately predetermined to either arrest defendant or detain him.

Because defendant did not challenge the legality of the arrest in his argument to the jury, and because the jury did not express confusion on that element of the offense, the trial court did not abuse its discretion in refusing to give the jury the requested instruction.

Defendant also claims that the task force lacked probable cause to arrest him and that the trial court erred in denying his motion to suppress the evidence against him. We disagree. "Probable cause to arrest exists if the facts available to the officer at the moment of the arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony." *People v Thomas*, 191 Mich App 576, 579; 478 NW2d 712 (1991). The evidence introduced at trial showed that the task force officers knew defendant was on parole, that the task force had received information that accurately described defendant's appearance and location on the date in question, and that defendant exited a known drug house before he went to the door on Gillette Street that informants had told the task force would be the site of a drug transaction. Defendant was also observed attempting to dispose of a bottle which,

based on the officers' observation, training, and experience, appeared to contain cocaine. This information available to the officers established probable cause to arrest defendant.

Defendant argues that because the identity, and thus reliability, of the informant was not part of the record, the information available to the officers should be considered of diminished value in establishing probable cause to arrest. This argument was rejected, however, by our Supreme Court in *People v Levine*, 461 Mich 172; 600 NW2d 622 (1999). There, the Court noted that in *Draper v United States*, 358 US 307; 79 S Ct 329; 3 L Ed 2d 327 (1959), the United States Supreme Court found that because the police had personally verified every facet of the information supplied to them by the informant except for whether the defendant actually possessed the drugs, they could presume that uncorroborated fact, and thus had reasonable grounds to arrest the defendant. *Id.* at 181.

In the instant case, since the officers had corroborated the other information supplied to them by the informants as credible, they could presume that defendant actually possessed the drugs they had been informed he would be possessing. Therefore, given the testimony on the record, including the fact that defendant was observed attempting to dispose of a juice bottle which appeared to the task force officers to contain cocaine, the trial court did not err in refusing to suppress the evidence.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder